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Alphonsus Uchenna Nwoye v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–219–09 OF 2013 (NGA)
AZIAH ALI, ROHANA YUSUF AND TENGKU MAIMUN JJCA
18 FEBRUARY 2015

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted and sentenced to death for trafficking in dangerous drugs — Dangerous Drugs Act 1952 — Drugs found in luggage bag — Defence of no knowledge and innocent carrier — Whether defence judiciously considered — Whether defence mere denial and afterthought — Whether conviction and sentence safe

D

The appellant was charged in the High Court for trafficking in 1056.1g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). The offence was said to have been committed at the luggage claim, Kuala Lumpur International Airport ('KLIA'). The appellant was seen pushing a trolley bag (exh P16) with a hand carry bag (exh P35). From the walls of the bag P16, SP3 found white powder and crystal which were later confirmed by the chemist (SP2) to be methamphetamine weighing 1056.1g, the subject matter of the charge. At the end of the prosecution's case, the learned trial judge found that the appellant had possession of the drugs pursuant to s 37(d) of the DDA and the appellant was called upon to enter his defence. The appellant stated that he was a student coming back to Kuala Lumpur from Nigeria when he was approached by a person who introduced himself as Amala at the Lagos International Airport. Amala had given the appellant exh P16 to be delivered to Amala's brother, Ifeanyi Okafor, who was also studying in Kuala Lumpur. The appellant denied having any knowledge of the drugs in the bag. His defence was one of innocent carrier. At the end of the defence case, the trial judge found that the defence was a mere denial and an afterthought. The appellant was thus convicted and sentenced to death. Aggrieved, the appellant appealed to the Court of Appeal. The appellant raised two grounds of appeal, namely, the trial judge failed to apply the correct burden of proof and to adequately consider the defence.

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Held, dismissing the appeal:

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(1) There were no merits in the first and second grounds. The trial judge had evaluated the evidence before coming to the conclusion that the defence had failed to cast a reasonable doubt on the prosecution's case and had failed to rebut the presumption of knowledge and possession of the drugs

under s 37(d) of the DDA. The conviction of the appellant was safe. The conviction and sentence by the High Court was affirmed (see paras 14, 17 & 19–20).

[Bahasa Malaysia summary

Perayu dituduh di Mahkamah Tinggi kerana mengedar dadah methamphetamine sebanyak 1056.1g, kesalahan yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Kesalahan dikatakan dilakukan di tempat tuntutan beg, Lapangan Terbang Kuala Lumpur ('KLIA'). Perayu dilihat menolak beg troli (lampiran P16) dengan beg galas (lampiran P35). Daripada dinding beg P16, SP3 mendapati serbuk putih dan jernih yang kemudiannya disahkan oleh ahli kimia (SP2) adalah methamphetamine 1056.1g, perkara tuduhan ini. Pada akhir kes pihak pendakwaan, hakim perbicaraan mendapati bahawa perayu mempunyai milikan dadah berikutan s 37(d) ADB dan perayu dipanggil untuk memasukkan pembelaannya. Perayu menyatakan bahawa dia adalah pelajar yang kembali ke Kuala Lumpur dari Nigeria apabila dia didekati oleh seorang yang memperkenalkan dirinya sebagai Amala di Lagos International Airport. Amala telah memberikan kepada perayu P16 untuk dihantar kepada saudara lelaki Amala, Ifeanyi Okafor, yang juga sedang belajar di Kuala Lumpur. Perayu menafikan mempunyai apa-apa pengetahuan mengenai dadah di dalam beg tersebut. Pembelaannya adalah pembawa tidak bersalah. Pada akhir kes pembelaan, hakim perbicaraan mendapati bahawa pembelaan adalah semata-mata penafian dan sesuatu yang tertinggal. Perayu oleh itu disabitkan dan dijatuhkan dengan hukuman mati. Tidak puas hati, perayu merayu kepada Mahkamah Rayuan. Perayu membangkitkan dua alasan rayuan, iaitu, hakim perbicaraan gagal untuk menggunapakai beban pembuktian yang betul dan untuk mempertimbangkan secara secukupnya pembelaan tersebut.

Diputuskan, menolak rayuan:

(1) Tidak terdapat merit dalam alasan pertama dan kedua. Hakim perbicaraan telah menilai keterangan sebelum mencapai kepada kesimpulan bahawa pembelaan telah gagal untuk melemparkan keraguan munasabah ke atas kes pihak pendakwaan dan telah gagal untuk mematahkan anggapan pengetahuan dan milikan dadah di bawah s 37(d) ADB. Sabitan perayu adalah selamat. Sabitan dan hukuman oleh Mahkamah Tinggi adalah disahkan (lihat perenggan 14, 17 & 19–20).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Isidro Leonardo Quito Cruz v PP [2013] 2 MLJ 1, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(2)

Appeal from: Criminal Trial No 45A-124–06 of 2012 (High Court, Shah Alam)

Geethan Ram Vincent (Jayarubbiny Jayaraj with him) (Sivananthan) for the appellant.
Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment if the court):

[1] The appellant was charged in the High Court at Shah Alam for the offence of trafficking in 1056.1g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The offence was said to have been committed at the luggage claim area G, KLIA Terminal on 6 November 2011.

[2] The background facts briefly were that on the material date, the appellant was seen by Inspector M Navamany a/l Retnam ('SP3'), who was on duty at Carousel G with three other policemen. The appellant was pushing a trolley bag (exh P16) with a hand carry bag (exh P35) on top of the trolley bag. SP3 instructed the appellant to scan the two bags. No suspicious images were revealed. The appellant however was said to be restless ('dalam keadaan gelisah') when the bags were scanned. SP3, who was suspicious of the appellant proceeded to examine the bags physically.

[3] SP3 found the trolley bag, with the name tag of the appellant, locked. Upon instructions by SP3, the appellant opened the bag with one of the keys which were kept in his trouser's pocket. SP3 examined exh P16. From the walls of the bag P16, SP3 found white powder and crystal which were later confirmed by the chemist (SP2) to be methamphetamine weighing 1056.1g, the subject matter of the charge.

[4] At the end of the prosecution's case, the learned trial judge found that the appellant had possession of the drugs pursuant to s 37(d) of the Act and relying on s 2, the learned trial judge found that a prima facie case had been made out against the appellant. The appellant was called upon to enter his defence.

[5] In his evidence given under oath, the appellant stated that he was a student at Edutrain International College, Kuala Lumpur. He said he was coming back to Kuala Lumpur from Nigeria when he was approached by a person who introduced himself as Amala at the Lagos International Airport. Amala had given the appellant exh P16 to be delivered to Amala's brother, Ifeanyi Okafor, who was also studying in Kuala Lumpur. The appellant denied having any knowledge of the drugs in the bag. His defence was one of innocent carrier.

[6] At the end of the defence case, the learned trial judge found that the defence was a mere denial and an afterthought which had failed to raise a reasonable doubt on the prosecution's case and had failed to rebut the presumption of knowledge under s 37(d) of the Act. The appellant was thus convicted and sentenced to death. Aggrieved, the appellant appealed to the Court of Appeal.

THE APPEAL

[7] Learned counsel for the appellant raised two grounds of appeal:

(a) that the learned trial judge failed to apply the correct burden of proof; and

(b) that the learned trial judge failed to adequately consider the defence.

[8] To appreciate the arguments of learned counsel on the first ground of appeal, we reproduce the submissions, as follows:

> 17. The Learned Trial Judge in his judgment had made the findings which were inconsistent. It was unclear whether the Learned Trial Judge made an affirmative finding by direct evidence Section 2 of the Dangerous Drugs Act 1952 ('DDA') or whether he relied on the presumption in Section 37(d) of the DDA.
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> 18. ...
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> 19. We humbly contend that the Learned Trial Judge had on one hand made a finding of trafficking by way of direct evidence and on another hand relied on the presumption in Section 37(d) DDA.
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> 20. However, Section 2 of DDA, to prove the act of trafficking by way of direct evidence was not at all proven in this case.
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> 21. In any event, it is evident that the Learned Trial Judge had applied the 'presumption' under Section 37(d) in this case, where the Appellant was deemed to have knowledge. Therefore the evidential burden on the Appellant would have been to rebut the presumption on the balance of probabilities.

22. Since Section 2 of the DDA was also applied in this case, then the standard of proof is for the Appellant to cast a reasonable doubt on the prosecution's case. Therefore, the judge has placed a higher burden on the Appellant to rebut the prosecution's case.

23. The Learned Trial Judge, once again, misdirected himself when he held that ... 'Pembelaan yang sedemikian tanpa bukti-bukti dan keterangan-keterangan lain adalah tidak mencukupi untuk mematahkan anggapan yang terpakai ke atasnya di bawah s 37(d). ADB tersebut dan juga tidak mencukupi untuk 'reasonably dislodge' kes pihak pendakwaan'.

OUR DECISION

[9] As regards the burden of proof, the Supreme Court speaking through Mohamed Azmi SCJ said in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 171:

> It is well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocence until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on a balance of probabilities.

[10] In the instant appeal, the learned trial judge had stated the following at the end of the prosecution's case (*rekod rayuan Jld* 4: pp 348–349):

> Pengetahuan dan milikkan (possession)
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> Untuk membuktikan pengetahuan dan milikkan, TPR yang bijaksana telah 'invoked' peruntukan anggapan (deeming) di bawah s. 37(d), ADB, yang *memperuntukkan '... any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drugs ...'.*
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> Di atas fakta-fakta dan keterangan yang dikemukakan dan setelah berjaya membuktikan bahawa OKT mempunyai jagaan dan kawalan ke atas beg yang dibawa/tarik olehnya, saya tidak mempunyai sebarang keraguan bahawa 'deeming provision' di bawah seksyen di atas adalah 'applicable' dan boleh di 'invoke' dengan sewajarnya ke atas OKT — lihat *Ibrahim Mohamed & Anor v PP* [2011] 4 CLJ 113; *PP v Tan Tatt Eek & Anor Appeal* [2005] 2 AMR 353.
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> Dalam keadaan sedemikian OKT bukan sahaja dianggap (deemed) mempunyai milikkan ke atas dadah tersebut tetapi juga dianggap sebagai mempunyai pengetahuan tentang jenis (nature) dadah tersebut sehinggalah dibuktikan sebaliknya. Anggapan statutori ini memberikan dispensasi kepada pihak

pendakwaan dari obligasi untuk membuktikan pengetahuan OKT tentang jenis dadah tersebut samada melalui keterangan terus (direct evidence) ataupun melalui inferensi dari fakta-fakta yang telah dibuktikan.

Atas premis bahawa anggapan statutori di atas adalah 'applicable' dan boleh di 'invoke' dengan sewajarnya (properly) ke atas OKT, maka adalah dapatan spesifik saya bahawa OKT sememangnya mempunyai dalam milikkannya dadah tersebut pada masa yang material itu .... (Emphasis added.)

[11] On trafficking, the learned judge said (*rekod rayuan Jld* 4: p 350):

Pihak pendakwaan bergantung kepada elemen-elemen pengedaran seperti didefinasikan dalam s. 2 ADB untuk membuktikan bahawa OKT telah memperedarkan dadah tersebut.

Penerbangan OKT bermula dari Dubai dan keterangan dari passportnya menunjukkan bahawa OKT telah diberi 'clearance' oleh pihak Immigresen Malaysia di KLIA untuk memasuki Negara ini.

Ketika OKT memasuki KLIA, beliau mempunyai dalam milikkannya dadah tersebut di dalam begnya yang dibawa (carried) olehnya. Perbuatan membawa (carry) dadah tersebut ke Malaysia melalui KLIA adalah mengedar (trafficking) mengikut definasi dibawah s.2, ADB ... .

[12] The learned trial judge went on to consider the weight of the drugs and citing *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, stated thus (*rekod rayuan Jld* 4: pp 352–353):

Selanjutnya kuantiti dadah yang besar tersebut, tanpa penjelasan yang 'plausible' dari OKT, boleh menimbulkan inferensi yang selamat bahawa dadah tersebut tidak dibawa untuk maksud kegunaan sendiri. ...

... tidak ada sebarang penjelasan atau 'rebuttal' dari OKT untuk menunjukkan bahawa dadah tersebut adalah untuk kegunaan sendiri.

Keterangan juga menunjukkan bahawa dadah tersebut telah disorokkan dengan licik sekali dalam ruang rongga-rongga di bahagian dalam dinding plastik yang melingkari keseluruhan bahagian dalam beg tersebut. Tujuan dadah tersebut disorokkan sebegitu rupa jelas menunjukkan cubaan OKT untuk mengaburi (deceive) pihak-pihak berkuasa Malaysia tentang kewujudan dadah tersebut dalam beg yang dibawa olehnya. ...

Perbuatan OKT membawa dadah tersebut secara mana dinyatakan di atas dan dalam kuantiti yang nyata jauh berlebihan untuk kegunaannya sendiri hanya membawa kepada satu inferensi sahaja iaitu OKT sememangnya mengedarkan dadah tersebut. ...

[13] Authorities are abundant to support the approach taken by the learned trial judge on s 37(d) and s 2 of the Act. Suffice to cite the case of *Isidro Leonardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1 where Abdull Hamid Embong FCJ stated that:

> [23] ... A person who is found to be in control and custody of dangerous drugs is deemed to be in possession if the presumption under s 37(d) is invoked and to have known the nature of such drug ... Alternatively, once the prosecution has succeeded in proving by direct evidence and thus, on a finding of fact, that a person is in possession of a certain amount of dangerous drugs as listed under s 37(da), he is in law presumed to be trafficking in that said drug, albeit without any intention for its distribution or consumption.
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> [24] ...
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> [25] Also by the very definition of trafficking under s 2 DDA, the appellant had been proven as a fact, to have trafficked in the said drugs by way of importing them into Malaysia. That act alone implies that he had trafficked in the said drugs, regardless of whether he had achieved the purpose of that act of importation. ...

[14] In the light of the above, we found the first ground of appeal devoid of any merit.

[15] On the second ground, it was the submission of learned counsel that the defence had not been adequately considered by the learned trial judge.

[16] The crux of the defence was that the appellant had met Amala at the airport and that Amala had requested the appellant to give the bag to Amala's brother, Efeanyi Okafor. This defence was advanced in the cautioned statement and it was put to the prosecution witnesses. In this regard, as conceded by learned deputy public prosecutor, the defence was not an afterthought defence as found by the learned trial judge.

[17] Be that as it may, we found that the learned trial judge had evaluated the evidence before coming to the conclusion that the defence had failed to cast a reasonable doubt on the prosecution's case and had failed to rebut the presumption of knowledge and possession of the drugs under s 37(d) of the Act.

[18] For convenience we quote the following findings of the learned trial judge (*rekod rayuan Jld* 4: pp 392–395):

> iv. Amat tidak munasabah lagi menghairankan bagi OKT yang hanya mengenali Amala sepintas lalu di Lapangan Terbang Lagos untuk bersetuju menerima dan membawa beg tersebut dari Amala ...
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> v. ...
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> vi OKT mengakui hanya mengenali Ifeanyi gitu-gitu sahaja. Maka adalah kesengajaan yang keterlaluan semasa di Lapangan Terbang tersebut untuk Amala muncul dan secara tiba-tiba boleh menghampiri lalu menegur OKT dan bertanyakan samada beliau kenal adiknya yang juga bernama Ifeanyi. Ini adalah

kebetulan-kebetulan atas kebetulan-kebetulan yang amat sukar untuk dipercayai, iaitu secara kebetulan OKT mengenali Ifeanyi dan secara kebetulan nama adik Amala juga Ifeanyi dan secara kebetulan kedua-dua mereka bertemu di Lapangan Terbang Antarabangsa Lagos dan secara kebetulan pula OKT waktu itu sememangnya ingin terbang ke Malaysia.

vii. OKT menyatakan tidak tahu siapa yang 'check-in' beg tersebut kerana mabuk. Kalau benar beliau mabuk sehingga tidak tahu siapa yang 'check-in' beg tersebut, maka bagaimana pula boleh 'check-in': dan naik kapalterbang yang betul untuk transit di Dubai sebelum meneruskan penerbangan ke Malaysia seperti mana dalam jadual tiket penerbangannya? Selanjutnya bagaimana beliau boleh tahu beg tersebut telah di 'check-in' dan seterusnya mengambil beg tersebut tanpa ragu-ragu di karousel Tuntutan Bagasi di KLIA? Begitu juga ia mengundang persoalan sama ada penumpang yang begitu mabuk boleh dibenarkan menaiki kapalterbang.

viii. Percakapan beramarannya (exhibit D-47) menyebut tentang Amala dan Ifeanyi hanya sepintas lalu, tidak terdapat butir-butir terperinci tentang kedua-dua mereka dalam D-47.

ix. OKT mempunyai 2 buah telefon bimbit tetapi langsung tidak dapat mengingati nombor-nombornya semasa disoalbalas oleh TPR yang bijaksana. Namun ketika disoal oleh peguambelanya, tanpa ragu-ragu beliau dapat mengingati nombor telefon Ifeanyi lantas memberikan nombor 017-6367075. Perincian tentang nombor telefon Ifeanyi ini juga tidak disebut dalam percakapan beramarannya (D-47).

x. Perihal beliau (OKT) ada memberitahu polis tentang nombor telefon Ifeanyi Okafor tersebut; perihal beliau ada memberitahu pihak polis bahawa Ifeanyi Okafor ada menunggu di luar KLIA untuk menerima beg tersebut; dan perihal beliau telah menghubungi Ifeanyi Okafor melalui telefon sesampainya di KLIA, selain tidak dinyatakan dalam percakapan beramarannya (D-47) juga tidak pernah ditimbulkan kepada mana-mana saksi pendakwaan di peringkat kes pendakwaan khususnya PW-3 dan PW-4. Isu-isu ini ditimbulkan pertama kali ketika OKT memberi keterangan di mahkamah.

[19] Apparent from the above that the learned trial judge had considered the defence concerning Amala and Ifeanyi. We therefore found the second ground of appeal to be similarly without merit and we found no ground for appellate intervention.

[20] Looking at the evidence in totality, we agreed with the findings of the learned trial judge. We found the conviction of the appellant safe. We unanimously dismissed the appeal. The conviction and sentence by the High Court was affirmed.

Appeal dismissed.

Reported by Afiq Mohamad Noor